

Pre-motion conference to be held on: 2/11/2013 @ 4:15 pm

Opposing counsel to state position (by letter not to exceed 3 pages) in writing one week in advance.

WILMERHALE

MEMO ENDORSED

January 4, 2013

So ordered.

Cathy Seibel
Cathy Seibel, U.S.D.J.

Peter J. Macdonald

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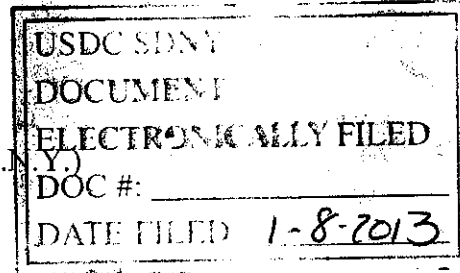
peter.macdonald@wilmerhale.com

VIA HAND DELIVERY

Honorable Cathy Seibel
 United States District Court for the Southern District of New York
 The Honorable Charles L. Briant Jr. Federal Building and United States Courthouse
 Room 218
 300 Quarropas Street
 White Plains, NY 10601-4150

Re: *Bozella v. County of Dutchess, et al*, No. 10 Civ. 4917 (S.D.N.Y.)

Dear Judge Seibel:



On behalf of Plaintiff Dewey R. Bozella, I write pursuant to the Court's Individual Practices to request a pre-motion conference in connection with a motion for partial summary judgment against Defendant Dutchess County (the "County"). Collateral estoppel bars the County from re-litigating the issue of whether the County violated Mr. Bozella's constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963) ("*Brady*"). The County litigated—and lost—that issue in the prior state court proceedings. *See People v. Bozella*, 25 Misc.3d 1215(A), 2009 WL 3364575 (N.Y. Cnty. Ct. Oct. 14, 2009). No additional discovery is needed and, on the basis of the undisputed record, Mr. Bozella is entitled to partial summary judgment on the County's violation of his constitutional rights under *Brady*.

The facts relevant to this motion are narrow in scope. In 2009, Mr. Bozella filed a motion pursuant to New York Crim. Proc. Law § 440.10 to vacate his murder conviction (the "440 Motion"), asserting that the Dutchess County District Attorney violated Mr. Bozella's constitutional rights under *Brady*. District Attorney William Grady then assigned his most senior trial prosecutor, Edward Whitesell, to respond to the 440 Motion. *See, e.g., Tr. of Dep. of Mr. Grady ("Grady Tr.")* (attached as Ex. A) at 202:17-203:6, 205:4-16 ("I told [Mr. Whitesell] that *[i]t was an important case, that it had to be handled appropriately*, and I wanted someone to handle it who I felt could handle it from the point of view of responding to the 440 motion, as well as being able to make a decision as to whether the case could be retried if we lost the 440 motion. *And because he was my most experienced trial attorney, I asked him to perform both responsibilities. . . . I told him to do a full and complete job.*") (emphasis added). Mr. Whitesell spent over three months investigating the claims in the 440 Motion, conferred with District Attorney Grady several times during that investigation, and opposed the motion. *See, e.g., id.* at 203:23-204:22, 214:15-215:15; *Tr. of Dep. of Mr. Whitesell* (attached as Ex. B) at 143:12-25. After allowing the District Attorney extended time to make all submissions he wished to make in opposition, the Dutchess County Court granted Mr. Bozella's motion in a detailed and comprehensive opinion. The Court concluded that the Dutchess County District Attorney violated Mr. Bozella's constitutional rights under *Brady* by not disclosing four categories of *Brady* material prior to his 1990 re-trial. *People v. Bozella*, 2009 WL 3364575, at *16 ("[U]pon

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a thorough and careful review of the record, the court, without reservation, is firmly and soundly convinced of the meritorious nature of the defendant's application. The legal and factual arguments advanced in support of the motion are compelling, indeed overwhelming.").

After the state court decision, District Attorney Grady conferred with Mr. Whitesell and the Chief of the Dutchess County District Attorney's Appeals Bureau about whether to appeal. *See, e.g.,* Grady Tr. at 229:17-230:19. After evaluating the decision carefully, District Attorney Grady made the decision not to appeal because he agreed "that the record was totally deficient of information or facts, which would allow us to be successful on an appeal." *See id.*

Mr. Bozella then pursued a *Monell* claim against Dutchess County, requiring him to establish, among other things, that the County violated his constitutional rights under *Brady*. *See, e.g., Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). Based on the undisputed facts summarized above, the County is collaterally estopped from re-litigating this element of the *Monell* claim because that precise issue was already fully litigated in the prior state court proceeding. Collateral estoppel prohibits re-litigation of an issue when (i) the identical issue was "necessarily decided in the prior action" and (ii) the party against whom collateral estoppel would apply had "a full and fair opportunity to contest the issue in the prior action." *See, e.g., Benjamin v. Coughlin*, 905 F.2d 571, 575 (2d Cir. 1990). Both elements are met here.

First, Mr. Bozella's principal argument in the 440 Motion (whether the Dutchess County District Attorney violated his constitutional rights under *Brady*) and the first element of his *Monell* claim (whether the Dutchess County District Attorney violated his constitutional rights under *Brady*) are identical. The Amended Complaint alleges that the Dutchess County District Attorney violated Mr. Bozella's rights under *Brady* by not disclosing the following four categories of evidence: (i) pages of a police report and related voluntary witness statements; (ii) a statement by Saul Holland to Defendant William J. O'Neill and two detectives on or about February 23, 1978; (iii) two police reports regarding the August 2, 1977 attack of Estelle Dobler; and (iv) an oral statement to detective Pete Murphy by Ms. Crapser's neighbor stating that she heard loud noises that sounded like one or more garbage cans were being moved in an alley adjacent to Ms. Crapser's home on the night of the murder. *E.g., Am. Compl.* ¶¶ 18-20, 26-33, 42-47, 55-68. These are *exactly* the same *Brady* violations that Mr. Bozella raised, the Dutchess County District Attorney opposed, and the Dutchess County Court found, in connection with the 440 Motion. *See, e.g., Benjamin*, 905 F.2d at 576 (collateral estoppel applied to issue of whether Department of Correctional Services' policy violated § 1983 plaintiff's constitutional rights where state court previously determined that the policy was unconstitutional); *Patzner v. Burkett*, 779 F.2d 1363, 1369 n.7 (8th Cir. 1985) (collateral estoppel applied to issue of whether arrest of § 1983 plaintiff was unconstitutional where state court previously determined that the arrest was unconstitutional).

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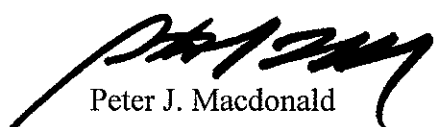
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Second, Dutchess County cannot meet its burden of showing that it did not have a full and fair opportunity to litigate this issue in the state action. The Dutchess County District Attorney spent more than three months investigating the issues raised in the 440 Motion, and asserted both factual and legal arguments opposing the motion. District Attorney Grady—the Dutchess County policymaker with respect to *Brady* and the District Attorney at the time of Mr. Bozella's 1990 re-trial, the litigation of the 440 Motion, and today—oversaw that process. He received the 440 Motion, read it, discussed it with two of his most senior assistants, assigned one of them to investigate its claims, approved the submission of the opposition to the motion, and elected not to appeal Judge Rooney's decision. *See, e.g.,* Grady Tr. at 197:14-198:8, 199:2-6, 202:2-203:18, 214:15-215:15; Whitesell Tr. at 128:18-129:5. Under controlling precedent, these facts establish that the County had a full and fair opportunity to litigate this issue in connection with the 440 Motion. *See, e.g., People ex rel. Dowdy v Smith*, 48 N.Y.2d 477, 482 (N.Y. 1979) (“[a]s to the identity of parties we encounter no difficulty in concluding . . . that for present purposes the People as prosecutors in the criminal action stood in sufficient relationship with the Division of Parole in the parole proceeding to meet the requirements of the doctrine in this respect”); *Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 640 (2d Cir. 1987) (“[O]ne whose interests were adequately represented by another vested with the authority of representation is bound by the judgment”) (citation omitted).

Entry of partial summary judgment will also further several goals of FRCP 56 and collateral estoppel. It will streamline the issues to be resolved at trial by eliminating the need to re-litigate whether the *Brady* material was disclosed to Mr. Bozella prior to the 1990 re-trial and whether the non-disclosure was material to the 1990 verdict. It will avoid jury confusion and unfair prejudice to Mr. Bozella by eliminating any possibility that the jury makes an improper assumption about the circumstances of Mr. Bozella's release from prison. And it will avoid any possibility of inconsistent decisions on the very issue that was the basis for Mr. Bozella's release from prison. *See, e.g., Liberty Media Corp. v. Vivendi Universal, S.A.*, 861 F. Supp. 2d 262, 273 (S.D.N.Y. 2012) (SAS) (“application of collateral estoppel . . . would prevent inconsistent decisions, thereby encouraging reliance on adjudication” and “should shorten the trial”).

The County has fully litigated the issue of whether it violated Mr. Bozella's constitutional rights. It is therefore barred from re-litigating the issue that it fought and lost in state court and this case should proceed to trial only on the remaining two elements of Mr. Bozella's *Monell* claim.

Respectfully submitted,



Peter J. Macdonald

cc: Patrick T. Burke, Esq. (via email)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEWEY R. BOZELLA,

Plaintiff,

vs. No. 10 Civ. 4917

THE COUNTY OF DUTCHESS and
WILLIAM J. O'NEILL,

Defendants.

VIDEOTAPED DEPOSITION OF WILLIAM GRADY

Thursday, August 23, 2012

10:30 a.m.

Reported by:

Joan Ferrara

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1 Grady

2 Q And I just want to make sure
3 that we define it. There was a memorandum
4 of law in connection with the 440 motion.
5 Do you have that understanding?

6 A Oh, yeah. I did not read that.

7 Q Okay.

8 I mean, the motion was probably
9 a one-page notice of motion. We can go
10 through the documents, but --

11 A The notice of motion. No, I
12 familiarized myself with the essence of the
13 440 motion.

14 Q Okay.

15 Why don't we mark the memorandum
16 of law. I just want to make sure that we
17 have a clear record of what it is that you
18 reviewed.

19 (Whereupon, Exhibit 1 was marked
20 for Identification.)

21 BY MR. FIRSENBAUM:

22 Q Mr. Grady, I'm showing you
23 what's been marked as Grady 1.

24 Do you recognize this document?

25 A Yes, I do.

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1 Grady

2 Q Is this what you were referring
3 to as the 440 motion?

4 A Yes.

5 Q Okay.

6 And you read this when you
7 received it?

8 A Yes, I did.

9 Q Okay.

10 Do you recall that there were
11 certain declarations or affidavits or
12 affirmations, whatever you want to call
13 them, that were submitted with this
14 document?

15 A I read the document. I do not
16 recall whether they were or not. If they
17 were, they were. They were part of it.

18 Q Okay.

19 A I acknowledge receipt of the
20 entire document.

21 MR. FIRSENBAUM: Why don't we
22 mark the other documents as well.

23 You know what, I take it back.

24 I don't think we need to mark it.

25 BY MR. FIRSENBAUM:

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1 Grady

2 Q After you read the 440 motion,
3 did you discuss it with someone?

4 A Yes, I did.

5 Q Who did you discuss it with?

6 A Bridget Steller.

7 Q And where did that conversation
8 take place?

9 A I'm not sure whether it was my
10 office or her office. She's right next to
11 mine.

12 Q Okay.

13 And what did you say to her and
14 what did she say to you?

15 A Well, we just received this very
16 extensive 440 motion. I'd like you to take
17 a look at it and tell me whether you can
18 handle it.

19 Q That's what you said to her?

20 A Yeah, I -- in words or
21 substance.

22 Q Okay.

23 And what did she say?

24 A To the best of my recollection,
25 she said that when looking at it, she's

1 Grady

2 Q What was the next conversation
3 you had about the 440 motion?

4 A It was with Ed Whitesell.

5 Q And where did that meeting take
6 place?

7 A I don't recall. Probably in my
8 office, but I don't recall.

9 Q And how long would you say that
10 meeting took?

11 A I have no recollection of that.

12 Q Did Mr. Whitesell read the 440
13 motion before you met with him?

14 A I don't know.

15 Q What did you say to
16 Mr. Whitesell during that meeting?

17 A I told him that we had, this
18 case involved a case that Bill O'Neill had
19 prosecuted. Bill is no longer in the
20 office. It was an important case, that it
21 had to be handled appropriately, and I
22 wanted someone to handle it who I felt
23 could handle it from the point of view of
24 responding to the 440 motion, as well as
25 being able to make a decision as to whether

1 Grady

2 the case could be retried if we lost the
3 440 motion.

4 And because he was my most
5 experienced trial attorney, I asked him to
6 perform both responsibilities.

7 Q And I take it you didn't just
8 tell him that you felt that he could handle
9 it, you actually believed that he could
10 handle it?

11 A I believed that he could handle
12 it, right. I didn't say to him I believe
13 you can handle it.

14 Q But that was your belief?

15 A That was my belief, yes.

16 Q Did Mr. Whitesell during that
17 meeting accept the assignment?

18 A I believe he did.

19 Q Did he convey to you how long it
20 might take him to get to a place where he
21 could respond to the 440 motion?

22 A No, he did not.

23 Q Did you discuss -- did you ask
24 him to provide you with a report or any
25 updates as his investigation went along?

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1 Grady

2 A No.

3 Q Did you have an expectation that
4 he would at any point?

5 A Well, I had an expectation and
6 he knew that I would be asking him from
7 time to time how things were going, because
8 although I don't intimately involve myself
9 in the particular facts of any specific
10 case when somebody else is handling, I do
11 involve myself with regard to them getting
12 it done and getting it done as quickly as
13 possible.

14 Q And did you get yourself
15 involved in the 440 process to that extent?

16 A To the extent of asking Ed from
17 time to time what's the status of the 440,
18 I did.

19 Q Okay.

20 And did Mr. Whitesell respond to
21 your questions?

22 A Oh, he did, sure.

23 Q And did you set up formal
24 meetings, or were they sort of just
25 conversations on an ad hoc basis?

1 Grady

2 A They were conversations on an ad
3 hoc basis.

4 Q Did you discuss with
5 Mr. Whitesell, did you suggest that he
6 speak to Mr. O'Neill?

7 A Specifically tell him to speak
8 to anybody, no. I gave him a general
9 overview of what I expected him to do, and
10 that is to confirm with as many people as
11 you could not only -- and obtain not only
12 information that would enable us to respond
13 to this 440, but that would enable us to
14 make a decision on whether we could retry
15 it if we had to. So to that extent, I told
16 him to do a full and complete job.

17 Now, whether I said specifically
18 Mr. O'Neill or not, I don't know.

19 Q You had an expectation that he
20 would do a full and complete job?

21 A Yes, I did.

22 Q During that meeting did
23 Mr. Whitesell express to you any
24 familiarity that he had with the case?

25 A I don't think he was familiar

1 Grady

2 document, but did you have this document in
3 your possession at any point in time before
4 the opposition was filed?

5 A I really, I really cannot
6 recall. I don't know. I've seen it,
7 obviously.

8 Now I -- since I've read it a
9 few times, I can't recall whether I am
10 saying I saw it before because I just read
11 it, not today, but before today, or whether
12 in fact I read it before. So I really have
13 no recollection of whether I did
14 specifically or not.

15 Q Okay.

16 Putting aside whether you read
17 it or not, you said that you had an
18 understanding as to the arguments made in
19 it, is that right?

20 A I believe I did.

21 Q Okay.

22 And did you get that
23 understanding from meetings with
24 Mr. Whitesell?

25 A Well, from time to time, when I

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1 Grady

2 asked him how the case was going, I believe
3 he would give me an update which may have
4 included different aspects of his response
5 to the 440. It's very difficult for me to
6 recall exactly what he said to me.

7 Because when I gave him the
8 responsibility of responding to this 440
9 motion, I did so not with the understanding
10 that I was giving it to an Assistant DA who
11 had limited experience on these matters, I
12 was giving it to one of my most senior
13 people, and he had full authority to
14 research and file the 440, which is done
15 normally all the time.

16 Bridget Steller, when she files
17 her 440 motions on important cases
18 involving murders or anything else, never
19 gives me her 440 to review. She just does
20 it. I have the confidence in her that
21 she'll do the right thing. And I had the
22 confidence in Whitesell that he would do
23 the right thing.

24 So I really don't recall whether
25 I read this or not.

1 Grady

2 Q And he, in fact, made a decision
3 as to what the best course of action would
4 be for the District Attorney's Office,
5 correct?

6 A He did.

7 Q And you didn't articulate any
8 opposition to that decision?

9 A No.

10 Q No, meaning correct?

11 A Yes.

12 Q Okay.

13 How did you learn about Judge
14 Rooney's decision on the 440 motion?

15 A I really don't recall. Someone
16 told me. I'm not sure who.

17 Q Do you recall having any
18 discussions with Mr. Whitesell, or anyone
19 else in the District Attorney's Office,
20 about what the next step would be in light
21 of Judge Rooney's decision?

22 A Yes.

23 Q What was the first discussion
24 that you had?

25 A Well, I don't know how many

1 Grady

2 discussions there were. I believe that
3 there had to be a review with regard to the
4 issues that we could raise if we were going
5 to try to effect an appeal of that
6 decision.

7 Bridget Steller was involved in
8 that discussion. The key on a 440 appeal
9 is whether the prosecution can establish
10 that the judge abused his discretion when
11 making a decision -- and Bridget, upon
12 reviewing the record, and Ed agreed that
13 the record was totally deficient of
14 information or facts, which would allow us
15 to be successful on an appeal -- so her
16 recommendation was not to appeal.

17 Q And you agreed with that
18 recommendation?

19 A Yes, I did.

20 Q Did you or anyone in the
21 District Attorney's Office consult with
22 Bill O'Neill during the time period between
23 Judge Rooney's decision and the October
24 28th hearing in the Bozella matter?

25 A What was the hearing on October

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEWEY R. BOZELLA,

Plaintiff,

vs. No. 10 Civ. 4917

THE COUNTY OF DUTCHESS and
WILLIAM J. O'NEILL,

Defendants.

VIDEOTAPED DEPOSITION OF EDWARD F. WHITESELL

Wednesday, July 18, 2012

10:22 a.m.

Reported by:

Joan Ferrara

1 Whitesell

2 decision not to create any documents in
3 connection with your investigation?

4 A No.

5 Q Okay.

6 I mean this is a matter of some
7 public interest, correct?

8 A Yes.

9 Q District Attorney Grady had been
10 at least quoted in the local press as
11 saying that there would be a complete
12 investigation and a report, correct?

13 A Yes.

14 Q Did you discuss with District
15 Attorney Grady that you will not be making
16 a written report?

17 A No.

18 Q Did you make an oral report to
19 District Attorney Grady at some point in
20 time?

21 A We spoke about what I was doing
22 on a few occasions during that time period,
23 and then prior to the answer -- or no --
24 prior to the answer being submitted, or at
25 about the time the answer was being

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1 Whitesell

2 submitted, we spoke more elaborately about
3 what was out there and what was being
4 submitted and what was in what I had
5 learned.

6 Q Okay.

7 Was there any factual
8 information that you had learned that you
9 provided to Mr. Grady, but which was not in
10 the opposition paper that you submitted
11 marked as Exhibit 5?

12 A Yes.

13 Q What was that?

14 A The most significant one was my
15 conversation with Wayne Mosely, which was a
16 telephone conversation I had prior to the
17 submission of the answer.

18 Q And what did Mr. Mosely say to
19 you and what did you say to Mr. Mosely?

20 A I had been looking for
21 Mr. Mosely for some time. The police had
22 indicated to me that they had contacted
23 him, but were not sure whether or not he
24 would reach out to me.

25 At some point prior to the

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1 Whitesell

2 Q And then the three other pieces
3 of evidence as to which you did not assert
4 that they had been produced to the defense,
5 but you had some legal arguments about
6 whether they should have been produced?

7 A Partially legal, but mostly
8 factual as to whether or not they
9 constituted Brady.

10 Q Okay.

11 Since it was -- strike it.

12 To be clear, on July 2nd, 2009
13 when the opposition was filed, it was your
14 position that Mr. Bozella should not be
15 released and the results of the trial
16 should not be changed?

17 A Yes.

18 Q And it's correct to say that to
19 the best of your ability you presented to
20 the Court all of the facts and all of the
21 arguments you felt supported that
22 conclusion?

23 MR. BURKE: Objection to the
24 form.

25 A Yes.